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SUPREME COURT, U. S.

Nos. 1184 and 1231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

PLASTERER'S LOCAL NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC., *Petitioners,*

v.

PLASTERER'S LOCAL NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Laborers' International Union of North America, AFL-CIO, hereby moves for leave to file a brief *amicus* in support of the Petitions in Nos. 1184 and 1231. The Contractor-Petitioners in No. 1231 and the Solicitor General in No. 1184 have granted their consent. Counsel for Plasterers' Local 79 has refused consent.

INTEREST OF THE AMICUS

1. The Laborers' International Union, an organization chartered in 1903 by the American Federation of Labor, is presently an affiliate of the AFL-CIO, and is the largest per capita tax affiliate of its Building and Construction Trades Department. The Laborers' Union, with a membership in excess of 600,000, represents highly skilled, semi-skilled and unskilled employees engaged in all phase of building, heavy and highway, and utility construction. As a result of organizational activities, and through thousands of collective bargaining agreements, national and local in scope, the Laborers' Union represents the largest number of craftsmen employed on construction projects and is, therefore, most likely to be affected by the adverse consequences of the decision below.

2. Under provisions of the constitution of the Building and Construction Trades Department, the Laborers' International Union and all other *affiliated International Unions* are directed to utilize the procedures of the Plan for the Settlement of Jurisdictional Disputes ("Plan"), which operates through the medium of a Joint Board. The Plan, in clear and unequivocal terms, provides that its procedures and awards are binding

only on those employers who have filed stipulations signifying their intention to be bound. Following the long line of unwavering NLRB and court decisions, and consistent with the recognition and interpretation given by the parties to the Plan's provisions, the Laborers' International Union has historically maintained within the Building and Construction Trades Department that it is bound by determinations of the Joint Board only where the employer responsible for the work assignment has stipulated or otherwise bound himself to Joint Board procedures.

The court below, however, ruled for the first time that the employer is not a "party" to a work assignment dispute, and concluded that notwithstanding provisions in the Joint Board Plan requiring employer assent, as long as the disputing unions are bound by Joint Board procedures for the adjustment of the dispute, the Joint Board award is not only binding on the employer and both unions, but the NLRB is forever ousted of authority to hear and determine the merits of the dispute.

The decision below has thus totally disrupted the long-settled basis for accommodating Joint Board and NLRB 10(k) procedures, and by placing the Laborers historical position in jeopardy, the court has injected notions which are foreign to the vital interests of both management and labor alike.[1]

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[1] In addition to the NLRB, the two employers directly involved in the dispute, and the Plasterers' and Bricklayers and Tile Setters Unions (participating in the court below), on March 22 and March 29, 1971, this Court granted permission for the filing of briefs *amici* by the Mason Contractors' Association of America, the Associated General Contractors of America, the International Association of Wall and Ceiling Contractors, the National Roofing Contractors' Association, the National Utility Contractors' Association, the Building and Construction Trades Department, and the Laborers' International Union of North America.

3. In addition, as an affiliate of the Building and Construction Trades Department, with a General President who is a member of the Joint Board Negotiating Committee, and with an international vice-president who regulatorly sits as a member of the Joint Board, the Laborers' International Union has special interests and experience which are beyond the expertise of the immediate parties, and whose views would be of assistance to this Court in focusing more directly on the issues involved herein.

4. The vast majority of employers in the construction industry have not agreed to be bound by the procedures of the Joint Board. The vast majority of the employees in the construction industry represented by the Laborers' Union are employed by contractors who are members of the Associated General Contractors of America ("AGC"). In addition to the AGC, there are other major segments of the construction industry, such as the Mainline-Pipeline Industry,[2] the home building industry,[3] the plastering and masonry industries,[4] and the heavy and highway industry, which are not partici-

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[2] The Mainline-Pipeline Industry has never been subject to Joint Board procedures, notwithstanding the fact that the Laborers', Teamsters', Plumbers' and Operating Engineers' International Unions are parties to national bargaining agreements covering that industry. Here, jurisdictional disputes are resolved through a pipeline industry employer-union policy committee.

[3] Residential building is the largest branch of the construction industry and the National Association of Home Builders, whose membership annually performs the largest share of new residential construction throughout the United States, is not and never has been a party to the National Joint Board.

[4] The Mason Contractors' Association and the Contracting Plasterers and Lathing International Association withdrew from the Joint Board Plan on August 1, 1963, and November 11, 1963, respectively.

pants in the operations of the Joint Board, but which employ substantial numbers of construction craftsmen represented by the Laborers' Union.[5]

The Laborers' Union has local and national agreements with employers in all of the aforementioned industries. However, there are no employers with voice or vote on the Joint Board to represent the interests of the General Contractor, the principal employer of members of basic trade unions (which includes the Laborers), and thus, no assurance that the interests of the General Contractor and his laborer-employees will be preserved and protected in proceedings conducted by the Joint Board. To the contrary, all the present employer associations which participate on the Joint Board are specialty contractor groups which primarily employ mechanical trades, and these employers do not engage in general construction work, such as that engaged in by the AGC, where laborers represented by the Laborers' Union are regularly employed.

5. The decision below threatens the stability of collective bargaining relationships in the construction industry. Thus, in the six months which have elapsed since the court below denied the Board's Petition for Rehearing, the Plumbers' Union has filed seven lawsuits, and the Electricians' Union has filed one lawsuit, all against the Laborers' Union and those employers

[5] By conservative estimate, the following numbers of employees represented by the Laborers' International Union are employed by the following contractor associations: AGC employs approximately 250,000; Mason Contractors Association of America employs approximately 100,000; Contracting Plasterers and Lathing International Association employs approximately 10,000 to 15,000; the National Association of Home Builders employs approximately 125,000; and there are approximately 40,000 laborers employed in the Pipeline Industry.

whose work assignments are being disputed.[6] In all of these cases in which the plaintiff unions seek to enforce Joint Board awards, the employer was not stipulated to, or otherwise bound by Joint Board procedures and the Laborers' Union was the recipient of the employer's assignment pursuant to provisions of valid collective bargaining agreements which provided for the resolution of disputes by procedures *other than* those of the Joint Board. The decision below has thus spawned unwarranted litigation, the sole purpose of which is to disrupt established collective bargaining relationships and subject the employer and the employees' chosen representative to enormous financial liability.

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[6] *Plumbers' Local 157* v. *Laborers' Local 204 and L & K Contracting Co.*, (complaint filed Oct. 21, 1970), C.A. No. 70-C-109 (D.C.S.D. Ind.); *Plumbers' Local 162* v. *Laborers; Int'l Union and Laborers' Local 1410 and B.G. Danis, Inc.*, (complaint filed Dec 9, 1970), C.A. No. 3980 (D.C.S.D. Ohio); *Plumbers' Local 162* v. *Laborers' Int'l Union and Laborers; Local 1410 and Ohio Excavators, Inc.*, (complaint filed Dec. 9, 1970), C.A. No. 3979 (D.C.S.D. Ohio); *Plumbers; Local 129* v. *Laborers' Local 210 and Edward J. DeBartolo Corp.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-580 (D.C.W.D.N.Y.); *Plumbers' Local 129* v. *Laborers; Local 91 and Albert Elia Bldg. Co.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-581 (D.C.W.D.N.Y.); *Plumbers' Local 36* v. *Laborers' Local 210 and Herbert F. Darling, Inc.*, (complaint filed December 15, 1970), C.A. No. 1970-583 (D.C.W.D.N.Y.); *IBEW Local 648* v. *Laborers' Local 534 and Jones Construction Company, Inc.*, (complaint filed January 5, 1971), C.A. No. 7817 (D.C.S.D. Ohio); *Plumbers' Local 157* v. *Laborers' Local 204 and Oberholtzer Construction Co.*, (complaint filed March 31, 1971), CA. No. TH 71-C-32 (D.C.S.D. Ind.). In addition, a similar action was filed solely against a contractor to protest his work assignment to laborers: *Operating Eng'rs. Local 150* v. *Wild Masonry Co.*, (complaint filed Nov. 23, 1970), C.A. No. 70-C-2944 (D.C.N.D. Ill.).

CONCLUSION

For the foregoing reasons, the Laborers' International Union believes that it has sufficient interest in this proceeding and, accordingly, respectfully requests the Court to grant this motion for leave to file the accompanying brief *amicus* in support of the petitions.

Respectfully submitted,

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May 1971

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BRIEF FOR THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AS AMICUS CURIAE

This brief *amicus* is filed by the Laborers' International Union of North America, AFL-CIO, contingent upon the Court's granting the foregoing Motion for Leave to File a Brief as *Amicus Curiae.*

The interest of Laborers' International Union appears on pp. i - v of the above-noted Motion, and is incorporated herein by reference.

SUMMARY OF ARGUMENT

The instant case involves the question of primary jurisdiction and supremacy where a direct conflict occurs between jurisdictional dispute awards rendered by the National Labor Relations Board ("NLRB") and the construction industry's private Plan for Settling Jurisdictional Disputes Nationally and Locally ("Plan") through the procedures of its Joint Board. The court below ruled that "the parties" to a jurisdictional dispute include only the disputing unions and not the employers whose work assignment generated the conflict, with the consequence that the NLRB "may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions [but not the employer] have agreed to settle their dispute through binding arbitration." (A., 363).*

Unions in the construction industry have always had some form of dispute-resolving arrangements, but these procedures excluded employers from their operation. However, realizing that the NLRB would not defer to the unilaterally operated union procedures in administering § 10(k), the Building Trades Unions reluctantly agreed to establish "joint" procedures which would allow equal voice and vote to employers. Thus, since its inception in 1948, the Plan has expressly provided for *joint and equal representation, voice and vote to employers and union alike.* Furthermore, the Plan has always contained the provision that its provisions and the awards of the Joint Board will *not* be binding upon any employers until "they have signed a stipulation setting forth that they are willing to subscribe

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* The designation ("A") refers to portions of the printed record designated as the parties' Appendix.

to and be bound by the terms and conditions of this agreement." (A., 343).

In addition, the industry itself has consistently recognized that an employer is a "necessary party" in the resolution of any jurisdictional dispute. During the early 1950's, when the NLRB was threading its way in the development of a meaningful 10(k) policy, Professor Archibald Cox prepared and filed with the NLRB comprehensive briefs on behalf of the Joint Board. In these documents the Joint Board unequivocally expressed its view that where the NLRB receives evidence indicating that the employer is not bound by the Joint Board agreement, the NLRB must hold a hearing and render a determination under § 10 (k).

The decision of the court below overrules 20 years of unwavering NLRB interpretation, and directly undermines the entire corpus of arbitration law as carefully developed by this Court from *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957), through the *Steelworkers trilogy.*[1] Although federal policy favors binding arbitration as a means of promoting industrial stability, this Court made it clear in *Warrior & Gulf* that "a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. . . ." (363 U.S. at 582). Further, this court has noted that the NLRB, in the exercise of its sound administrative judgment, must examine the impact which private methods of adjustment may have on the public interest, and therefore "if by the time the dispute reaches the

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[1] *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

Board, arbitration has already taken place, the Board shows deference to the arbitral award, provided the procedure was a fair one and the results not repugnant to the Act."[2]

Accordingly, in determining under § 10(k) whether satisfactory evidence has been submitted which would indicate that the parties have agreed upon "methods for the voluntary adjustment of the dispute," the Labor Board has, in effect, applied the same standards enunciated in *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), where the Board held that it would recognize awards of arbitrators if "[1] the proceedings appear to have been fair and regular, [2] all parties had agreed to be bound, and [3] the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."

The interpretation which the NLRB has given to § 10(k) supports basic federal policy by (1) casting the NLRB in a central role whereby it is able to guide the development of appropriate procedures for the resolution of jurisdictional disputes, and (2) providing monitoring procedures to insure that "agreed-upon methods of adjustment" are, indeed, fair and regular and consistent with basic standards of due process.

Although the NLRB has encouraged the Joint Board to develop procedures which would comport with basic due process standards required of all arbitration bodies, the Joint Board has refused to heed the NLRB's invitation. The result has been substantial employer and union dissatisfaction with Joint Board procedures. At various times during its 22-year history, numerous unions and employer associations have withdrawn from

[2] *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-1 (1964).

the Joint Board Plan (the most recent occurring on September 30, 1969, when the AGC served its notice of termination). The basis for the underlying employer-union dissatisfaction varies, but several reasons cited have included: (a) Joint Board disregard for the provisions of the Plan, as evidenced by its routine assertion of jurisdiction over disputes in cases where it has been specifically advised that the employer is not stipulated or otherwise bound to its procedures; (b) notwithstanding provisions which require the Joint Board to give due regard to such factors as "efficiency and economy," most decisions are based upon archaic and unrealistic decisions of another era, resulting in Joint Board awards which reverse employer assignments in over 80% of the cases handled; and (c) although the Plan purports to provide equal representation to all segments of the construction industry, since the withdrawal by the AGC there have been no general contractors on the Joint Board who possess the interest or experience to properly represent the General Contractor and the employees who hold membership in basic trades unions and are employed in the three basic branches of the industry.

The court below was either unaware or indifferent to the myriad conflicts which were generated by its radical interpretation. Although suggesting that no problems inhere in seeking to enforce Joint Board awards against non-stipulated employers, the court was apparently unmindful of the fact that especially in the construction industry, the existence of a valid collective bargaining agreement is the *sine qua non* of industrial stability and employment security. Accordingly, if the decision below actually contemplates that the losing union should "renounce an assignment," what protection does it have when the employer commences his

own § 301 or §303 suit against that union for violating its collective bargaining agreement? And in the same circumstances, what protection is afforded to the renouncing union when employees file unfair labor practice charges, and commence individual lawsuits for the union's breach of its duty of fair representation. Further, if an employer is to cease recognizing the incumbent collective bargaining representative and replace the existing employees with members of a "stranger" union which received the Joint Board award, how is the NLRB to handle charges alleging that the replacement of employees violates § 8(a)(3), that the recognition of the "stranger" union violates § 8(a)(2), and that in the process there was a trampling on the "employees" established § 7 rights? These and other unsettling problems require this Court's attention, and summary reversal of the decision below.

ARGUMENT

A. THE EMPLOYER IS AN INDISPENSABLE "PARTY" IN JOINT BOARD PROCEEDINGS

1. Construction Industry Boards

Following the formation of the American Federation of Labor, the construction unions collectively developed numerous boards and panels to provide procedures for the settlement of jurisdictional disputes. Professor Strand[3] places the beginnings of formalized procedures with the formation of the National Building Trades Council in 1897. That Council, like all successor Boards developed during the next 20 years,

[3] The history and development of dispute-settling procedures in the Building and Construction industry is given detailed treatment in Strand, *Jurisdictional Disputes in Construction: The Causes, the Joint Board, and the NLRB*, 61 *et seq.* (1961).

operated strictly as an inter-union arrangement with no provisions being made for employer participation in any form. However, for an eight year period following World War I, the American Federation of Labor accepted a proposal outlined by the American Institute of Architects which, for the first time, permitted employers to participate in settlement procedures under the National Board for Jurisdictional Awards. This Board, which was undistinguished in its operations, "collapsed" in 1927 and the construction trades reverted to their previous inter-union settlement procedures. Although several different "Boards" emerged and dissolved during the early 1930's,[4] no significant changes occurred until the "Referee" system was established by the Building and Construction Trades Department, AFL, in 1936.

The "Referee" system for resolving jurisdictional disputes, like its predecessor Boards, was strictly an inter-union arrangement in which the union-approved "referee" was empowered to render final and binding decisions only on questions appealed to him by international unions affiliated with the Department. The system did not contemplate "permanent resolutions," as the Referee's decisions were limited solely to the particular job at which the dispute arose. Although various aspects of the procedures "rendered the Referee System ineffectual," [5] it lasted longer than any of

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[4] Professor Strand reports that following the "collapse" of the National Board for Jurisdictional Awards, a "weak" Board of Trade Claims operated for about five years—until the National Planning Adjustment Board (NPAB) was established under the National Industrial Recovery Act. The NPAB, however, functioned for slightly over one year until "declared invalid" by this court in *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495 (1935). See Strand, *supra*, n.3 at 67.

[5] See Strand, *supra*, n.3 at 63.

the other boards or plans. On June 23, 1947, the Taft-Hartley Act was enacted into law. On July 9, 1947, the Building Trades Department suspended the Referee System "upon the legal advice that it violated the provisions of this act." [6]

2. The National Joint Board

Six months prior to the passage of the Taft-Hartley Act, the Executive Council of the Building and Construction Trades Department (hereafter Department) met with representatives of the Associated General Contractors of America (hereafter AGC) to consider a proposed agreement for the settlement of jurisdictional disputes. Under this arrangement, separate committees were to be established to resolve disputes arising in the three basic branches of the construction industry: (1) highway and utility construction work, (2) heavy construction work, and (3) building construction work. The proposal contemplated that these industry committees would be composed of an equal number of AGC and labor representatives from each branch of the industry. In addition, the plan also proposed that representation would be afforded to a national association and a labor representative serving the "specialized and subcontracting employers." The Plan provided for the creation of a National Joint Conference Committee which would attempt to resolve disputes referred to it by the various branch committees where settlement failed to occur at the local level.

The proposed Plan for joint operation had one major drawback. Instead of replacing the union controlled procedures, the then existing inter-union procedures were to be continued and resort thereto was mandatory in each dispute. As contemplated, the various com-

[6] Strand, *supra*, n.3 at 69.

mittees acquired jurisdiction to decide disputes only upon the mutual consent and submission of all of the "parties" who, under the Plan, were expressly recognized as being the unions affiliated with the Department *and the employers* affiliated with the AGC. Upon the passage of the Taft-Hartley Act, this proposed plan was dropped upon the suggestion by the AGC "that there be a Joint Committee of equal representation of employers and employees in the construction industry with an impartial chairman, created to render decisions on jurisdictional disputes. . . ."[7]

Thereafter, at its January 1948 meeting, the Executive Council of the Department, with the assistance of Professor John T. Dunlop and NLRB General Counsel Robert Denham, met with negotiating committees composed of employer-members of the AGC and various specialty contractor associations in an effort to devise a plan which would conform to the requirements of §§ 8(b)(4)(D) and 10(k) of the Act. These negotiations resulted in the establishment of a Plan for National Joint Board for Settlement of Jurisdictional Disputes which, as suggested by the NLRB, would be binding on those employers and unions who committed themselves to the Plan's procedures.[8] The new Plan

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[7] Report of Executive Council to 40th Annual Convention, Building Trades Department, p. 107 (1947).

[8] On Feb. 11, 1948, in an address to the AGC Convention, NLRB General Counsel Denham stated:

> . . . We of the [NLRB] have suggested to the Associated General Contractors, to the National Associations of Specialty Contractors, and to the officials of the labor organizations that are predominant in the field the desirability of working out among themselves, if possible, some joint procedure to which *both the labor organizations and the members of the various employer associations would be firmly committed.* . . . (Emphasis added) [21 LRRM 51 (1948)].

was executed by the Department, the AGC, and seven national associations of specialty contractors, and became effective May 1, 1948.

The 1948 Plan, which is substantially the same as the present Plan, established a Joint Board providing, as the name implies, *joint and equal representation, voice, and vote to employers and unions alike.* Hence, since its inception, the Plan has required that the Joint Board consist of an equal number of employers (further divided equally between General Contractors and Specialty Contractors) and unions (also equally divided between basic trade unions and specialty unions) and an "impartial chairman".[9]

In addition, throughout the Plan and the Joint Board's Procedural Rules, there is repeated reference to the word "parties," and there is no question but that the term includes the employer or his representative. For example, Article III, § 3, in dealing with the procedures for Hearings Panels and National Decisions, specifically requires the impartial umpire to notify all "na-

[9] Following the terms of the original Plan, the current Plan outlines the basis for appointment of employer representatives to the Joint Board and imposes upon the employers the obligation to assume 50% of the expenses incurred in the operations of the Joint Board. (Article II, § 1). Article II, § 4, further imposes upon the Joint Board the duty "to consider and decide cases of jurisdictional disputes in the building and construction industry, which disputes are referred to it by . . . an *employer directly affected by the dispute* on the work in which he is engaged or by a participating organization representing such employer." (Emphasis added) Parallel provisions are also included regarding representation, voice, vote, and allocation of expenses pertaining to the operations of the Appeals Board (Article II, §§ 2 and 5), and with regard to the conduct of Hearings Panels for National Decisions (Article III, §§ 2-7).

tional participating employers' associations" of the existing controversy in order that they might avail themselves of the provision which allows "*all parties* interested to intervene. Thirty days' notice shall be given of the date set for the hearing. Briefs shall be submitted and exchanged by *all parties to the dispute* at least 10 days prior to the hearing date." (Emphasis added.) Further, Article III, § 7, indicates that "any decision or interpretation by the Joint Board shall be immediately accepted and complied with by *all parties subject to this agreement* . . . ." and Article VI, § 1, specifies that the parties subject to the agreement are the Department and the employer signatories representing the specialty contractors' associations and the AGC.

Moreover, from 1948 to the present time, the express provisions of the Plan as well as the contemporaneous interpretation of the parties thereto have recognized that the Plan would be compatible with the statutory requirements of § 10(k) only so long as the employer responsible for the assignment of the disputed work specifically "stipulated" or otherwise assented to be bound by Joint Board decisions.[10]

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[10] At the time the Plan was adopted, Richard J. Gray, President of the Building Trades Department, announced to the delegates in convention assembled that "in order to take advantage of the Plan, contractors do not have to belong to one of the ratifying associations, but must employ members of unions affiliated with the Building and Construction Trades Department, *and must sign a stipulation agreeing to be bound by decisions of the National Joint Boards.*" (Emphasis added) 41st Annual Convention, Building Trades Department, p. 117 (1948).

Thus, Article V, § 5 of the original Plan and Article III, § 7 of the Plan in effect at the time of the instant dispute contain the following identical[11] provision:

> It is understood only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL-CIO, shall be considered as bound by this agreement *when they have signed a stipulation* setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement. (Emphasis added).[12]

The foregoing provisions of the Plan have also been restated, with additional elaboration, as part of the "Procedural Rules and Regulations of the National Joint Board":

> These procedures shall apply to:
>
> (a) Contractors who employ members of the organizations affiliated with the Building and Construction Trades Department, AFL-CIO, and *who have signed a stipulation* setting forth that they are *willing to be bound* by the terms of the agreement establishing the Joint Board, *or* who are members of a signatory association of contractors with *authority to bind* its members *or* who are parties to a collective bargaining agreement *providing* for the settlement of jurisdictional disputes under

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[11] The only language change was to substitute "AFL-CIO" for "A.F. of L." following the 1955 merger.

[12] On September 30, 1969, the AGC terminated the original Plan and withdrew from further negotiations. On April 7, 1970, a renegotiated Plan was executed between the Department and the "Participating [Specialty] Contractors' Employers' Associations." The identical provision appearing in the text which binds the Plan only to those contractors who "have signed a stipulation" was carried forward into the current Plan without change. (See Plan contained in "Green Book," Art. III, § 7, p. 10, 1970).

> the procedures herein set forth. (Emphasis added). (A., 343)

In addition to the foregoing provisions governing the operations of the Joint Board, the industry itself has consistently recognized that an employer is a "necessary party" in the resolution of any jurisdictional dispute. In the mid-1950's, the Labor Board had not yet finalized its views on the scope of 10(k) operations and the National Joint Board retained Professor Archibald Cox (later Solicitor General) to prepare and file with the NLRB comprehensive briefs on its behalf as *Amicus Curiae* in the *A. W. Lee,* 113 NLRB 947 (1955) and *Acoustical Contractors,* 119 NLRB 1345 (1958) cases. In these briefs, Professor Cox attempted to persuade the NLRB to alter its 10(k) procedures and proceed instead to decide jurisdictional dispute cases on their merits (as this Court ultimately ruled in *NLRB* v. *Radio and Television Broadcast Engineers Local 1212* ("CBS"), 364 U.S. 573 (1961)). Thus, Professor Cox urged that when a charge is filed alleging a violation of § 8(b)(4)(D), "if there is a *bona fide* question as to whether all parties are bound, a hearing should be held under § 10(k). If it is admitted that all parties are bound, or if the NLRB find them to be bound, there is satisfactory evidence that the parties have 'agreed upon methods for voluntary adjustment of the dispute' and the NLRB has no authority to proceed further under § 10(k)." [*Acoustical Contractors,* (Jt. Bd. Br. p. 23)]. On the other hand, when an 8(b)(4)(D) charge is filed "and there is no evidence that all parties are bound by the Joint Board Agreement, *the NLRB should hold a hearing and make a determination under §10(k).* The determination should be made on the merits of the jurisdictional dispute."

(Emphasis added) [*Acoustical Contractors,* (Jt. Bd. Br. p. 26)] [13]

The Laborers' International Union has maintained a consistent position within the Building Trades Department which comports with the aforementioned language of the Plan and the contemporaneous understanding of unions and employers in the construction industry, and its view has been consistently sustained by the NLRB.[14] Other affiliates of the Department have similarly maintained, both within the Department and successfully before the NLRB, that they are bound to the Joint Board only where the employer responsible for the assignment has voluntarily stipulated or agreed to be bound by the Plan.[15] Indeed, in the instant case,

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[13] Elsewhere in the Joint Board brief, Professor Cox made it eminently clear that employers were "parties" to the dispute and that the NLRB concededly had the duty to decide cases under Section 10(k) where the employer was not stipulated to utilize the Joint Board. Thus, "[T]o put the matter concretely, suppose that a general contractor not bound by the Joint Board Agreement assigns laborers to erect a twenty-foot self-supporting scaffolding. The carpenters would probably claim the work. *If they strike and a charge is filed, the NLRB must make a determination under Section 10(k).*" (Emphasis added). [*Acoustical Contractors,* (Jt. Bd. Br., p. 57)]. See also, excerpt of Joint Board Brief filed as Appendix to Respondent's Brief (pp. 1a-4a) in *NLRB* v. *Radio and Television Broadcasting Engineers Local 1212,* ("CBS"), 364 U.S. 573 (1961), No. 69, Oct. Term 1960.

[14] See, *e.g., Operating Engineers' Local 66 (Badolato and Son),* 135 NLRB 1392 (1962); *Metal Lathers' Local 46 (Precrete, Inc.),* 136 NLRB 1072 (1962); *United Association of Plumbers' Local 5 (Arthur Venneri Co.),* 145 NLRB 1580 (1964).

[15] Because of the provisions of Section 10(k) which require submission of satisfactory evidence that the parties have agreed upon a "voluntary" method of adjustment, unions have, therefore, recognized the supremacy of the statutory requirements, provisions of union constitutions to the contrary notwithstanding. For example,

the Tile Setters Union continued to defend before the NLRB and the court below its right to perform the work assigned to it by the Texas State Tile and Terrazzo Company ("Texas State") because that company had never assented to be bound by Joint Board procedures (A., 16, 22), and the NLRB therefore quite properly proceeded to determine the merits of the dispute as required by § 10(k) of the Act.[16] In reversing the NLRB, the court below, like the Joint Board itself, totally ignored those express provisions of the Plan which require employer stipulations; and by severing the employer's interests and assigning no role to the employer in the resolution of jurisdictional disputes, the court has, in effect, rewritten the Joint Board Plan and reinstituted the pre-1948 "Referee" system. Moreover, the effect of the court's erroneous interpretation is to totally disrupt settled NLRB procedures, to relegate the handling of all jurisdictional disputes to the Joint Board, and to forever foreclose any possible recourse by the employer or any other person to the procedures of § 10(k).

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in *Operating Engineers Local 450 (Rust Engineering Co.)*, 169 NLRB 1026 (1968), the NLRB noted that with respect to "outside" line work the International Brotherhood of Electrical Workers "has consistently refused participation in the NJB [National Joint Board], and we have in the past recognized this refusal." See also, *Mill Wrights Local 1862 (Jelco, Inc.)*, 184 NLRB No. 58, 74 LRRM 1485, 1486 (1970).

[16] In the instant case, the Plasterers' Union protested Texas State's assignment of the disputed work to Tile Setters by *picketing* and by submitting the matter to the Joint Board. In contesting the same assignment by Martini Tile and Terrazzo Company, the Plasterers' Union limited its protest to picketing; the merits of the dispute, however, were never submitted to, or considered by, the Joint Board. (A. 16-17).

B. THE DECISION BELOW UNDERMINES VOLUNTARY ARBITRATION PROCEDURES

In the 1960 *Steelworkers Trilogy*,[17] this Court declared that federal policy favored binding arbitration as a means of promoting industrial stability. This Court made it clear, however, that the duty to arbitrate arises only from the *voluntary* undertaking by a party agreeing to submit a particular matter to arbitration. Thus, in *Warrior & Gulf*, this Court stated:

> The Congress, however, has by § 301 of the Labor-Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached its promise to arbitrate. *For arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. . . . [T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made.* (Emphasis added) 363 U.S. at 582.

By the same reasoning, it is submitted that Congress, by enacting § 10(k), sought "to interject the NLRB as the arbitrator of jurisdictional strikes" [18] and assigned to it the duty of determining (1) whether a voluntary method of adjustment exists and (2) whether all of the parties have voluntarily agreed to be bound by that method.

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[17] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[18] Note, *the Non-neutral Employer and Section 10(k) of the National Labor Relations Act*, 20 Catholic U. L.Rev., 343, 354 (1970).

Reference to the provisions of § 10(k) discloses that the NLRB is vested with discretion to determine whether the parties have submitted "to the Board *satisfactory evidence* that they have adjusted, or agreed upon methods for the *voluntary adjustment* of, the dispute. . . ." (Emphasis added). In exercising this discretion, the NLRB, faithful to congressional intent [19] and this Court's mandate in *CBS*,[20] has applied to Joint Board proceedings the same notions and standards which are generally applicable to other arbitral bodies. "If by the time the dispute reaches the Board, arbitration has already taken place, the Board shows deference to the arbitral award, provided the procedure was a fair one and the results not repugnant to the

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[19] See § 203(d) of the Act, 61 Stat. 154, 29 U.S.C. 173(d). See also comments of Senator Murray, "that full opportunity is given the parties to reach a *voluntary* accommodation without governmental intervention *if they so desire.*" (Emphasis added). 93 *Cong. Rec.* 4035, 2 *Leg. Hist. LMRA* 1046 (1947).

[20] In *NLRB* v. *Radio & Television Broadcast Engineers ("CBS")*, 364 U.S. 573 (1961), after ruling that the NLRB was required by § 10(k) to decide work assignment disputes on their merits, this Court stated (at 583):

> It is true that this forces the Board to exercise under § 10(k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes . . . . It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by *arbitrators*, unions, employers, *joint boards* and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. *Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.* (Emphasis added).

Act." *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-271 (1964).

Accordingly, in what has come to be known as the *Spielberg* doctrine, the Board held that it would recognize awards of arbitrators where "[1] the proceedings appear to have been fair and regular, [2] *all parties had agreed to be bound,* and [3] the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." (Emphasis added). *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). The foregoing standard reflects an effort by the NLRB to encourage the voluntary settlement of labor disputes through procedures which incorporate elementary principles of due process.[21] At the same time, where the arbitral process purports to bind a party who has never agreed "to give the arbitrator power to make the award"[22] or where the proceedings are "tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes of the Act,"[23] the Board is mandated

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[21] In *Retail Clerks Local 770* v. *Thriftmart, Inc.*, 59 Cal. 2d 421, 423-24, 380 P.2d 652, 655-56 (1963), Chief Judge Traynor held that due process prohibits enforcement of an arbitration award against a non-participating party.

[22] *United Steelworkers* v. *Warrior & Gulf*, 363 U.S. 574, 582 (1960). See also, *Retail Clerks Local 428* v. *L. Bloom Sons Co.*, 173 Cal. App. 2d 701, 703, 344 P.2d 51, 52-53 (1959), where the court rejected as "patently absurd [the] proposition that two parties can by contract effectively stipulate for the mode of determination of the rights of a third party who has not only not assented to such a mode of determination, but who also is not even accorded an opportunity to participate in such determination." See also, Note, *The Non-neutral Employer and Section 10(k) of the National Labor Relations Act*, 20 Catholic U. L.Rev. 343, 357 at n.90 (1970).

[23] *International Harvester Company*, 138 NLRB 923, 927 (1962).

to ignore the arbitral award and proceed to resolve the underlying dispute.[24] Although the Board's application of the *Spielberg* standards to diverse situations was viewed approvingly by this Court in *Carey* v. *Westinghouse,*[25] the court below, in overturning more than twenty years of NLRB experience and practice in dealing with jurisdictional disputes, displayed neither awareness nor concern that it was also overturning the entire corpus of NLRB-arbitration precedent.

C. FEDERAL POLICY FAVORS THE NATIONAL LABOR RELATIONS BOARD'S INTERPRETATION AND PROCEDURES

The interpretation which the court below has placed upon § 10(k) requires the NLRB to halt its processes and defer to "union agreements reached after the proceedings are begun." (A., 382-83). Such construction, however, misconceives and undermines the central role which the NLRB was expected to play in the development and uniform administration of our national labor policy. Indeed, while the NLRB's authority has uniformly been regarded as "exclusive" on matters falling within the coverage of the Act, by sub-

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[24] Section 10(a) of the Act, 29 U.S.C. 160(a) provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . . ." See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 267-8 (1940).

[25] *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-1, n.7 and 8 (1964). See also, *Smith* v. *Evening News Association*, 371 U.S. 195, 198, at n.6 (1962), where this Court observed that "the Board has, on prior occasions, declined to exercise its jurisdiction to deal with unfair labor practices in circumstances where, in its judgment, federal labor policy would best be served by leaving the parties to other processes of the law. See, e.g., *Consolidated Aircraft Corp.*, 47 NLRB 694; *Speilberg Mfg. Co.*, 112 NLRB 1080."

ordinating it to "union agreements," the court below places private settlements above the public interest which the Board alone was entrusted to protect. In addition, the court's construction strips the NLRB of its authority to provide uniformity in handling jurisdictional disputes which, under general notions of federal supremacy, the Board alone was expected to provide through centralized administration.[26]

Nevertheless, the NLRB has been a reluctant dragon of sorts in the jurisdictional arena: while it would have preferred Congress to place dispute-resolving mechanisms in the hands of arbitrators or private bodies, Congress deleted the provisions which would have authorized private arbitration "leaving it to the *Board alone* 'to hear and determine' the underlying jurisdictional dispute." (Emphasis added). (*CBS*, 364 U.S. 573, 581). Accordingly, in discharging its responsibilities, the NLRB has earnestly sought to effectuate congressional policy by developing standards and guidelines which will accommodate its undoubted 10(k) authority to private arbitration procedures. And it has endeavored to support Joint Board procedures by inviting the parties thereto to develop the kind of objective procedures which would comport with basic due process standards required of all arbitration bodies.[27]

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[26] The preemption doctrine recognizes the NLRB as the supreme and exclusive authority providing uniformity in labor matters, since "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 243 (1959), quoting from *Garner* v. *Teamsters' Union*, 346 U.S. 485, 471 (1953).

[27] See, e.g., *Plasterers', Local 65, (Twin City Tile and Marble Co.,)* 152 NLRB No. 1609, 1616 (1965) and *Millwrights, Local 1102 (Don Cartage)* 154 NLRB 513, 515-17 (1965).

The Joint Board, however, has refused to heed the NLRB's invitation and has adamantly continued in its practice of disregarding the provisions of its own arbitration Plan. Indeed, although the court below erroneously assumed that the Joint Board had no "infirmity that undercut its fairness and reliability as a method of achieving the industrial peace that is the legitimate objective of Congress" (A. 384-85); it was the Joint Board's consistent violation of its own procedures in rendering decisions over non-stipulated contractors that produced the recent impasse in Joint Board negotiations and caused the AGC to sever its twenty year relationship with the Plan. It was the same consistent practice which caused the Laborers' Union, one of the union members of the Joint Board negotiating committee, to vote against continuation of the present Plan. And it is because of Joint Board persistence in assuming the power to bind a non-assenting party in violation of its own rules that makes conflict between it and the NLRB inevitable.[28]

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[28] Since § 10(k) becomes operative only where a union engages in conduct violative of § 8(b)(4)(D), the hoped-for alternative to industrial strife which the Joint Board Plan was to provide has not been realized; and the inevitable conflict arises in those cases *where employers are not stipulated,* and the union successful before the Joint Board resorts to picketing and other self-help measures to enforce an award which the employer has no obligation to respect. See, *e.g., Bldg. & Constr. Trades Council (Charles J. Dorfman),* 173 NLRB No. 208, 69 LRRM 1594 (1968); *Plumbers Local 189 (R. W. Wander),* 176 NLRB No. 129, 71 LRRM 1340, 1341, n.2 (1969), where the Joint Board paid no heed to the pendency of § 10(k) proceedings and proceeded to hold the Laborers' Union in noncompliance notwithstanding the total lack of authority for the Joint Board's assumption of jurisdiction to issue the award in the first place.

1. Employer and Union Dissatisfaction With Joint Board.

Employer and union dissatisfaction with the operations of the Joint Board is not of recent vintage. On May 16, 1949, less than one year after the Plan had been in operation, the Executive Council of the Department voted to abolish the Joint Board and return to the union-controlled 1946 Plan. However, concern that the exclusion of employers from the Plan would cause contractors to submit all jurisdictional strike matters to the NLRB prompted a further extension of the Plan for another year.[29] From that time to the present, nearly every Joint Board negotiating session has involved "many serious controversies over the procedures and decisions of the Joint Board which have threatened its continuation."[30]

Although the reasons for employer dissatisfaction vary, a review of Joint Board decisions covering the 3-year period, 1968-70, discloses that the Joint Board has reversed employer assignments in over 80% of the cases. (Laborers' Appendix, *infra,* p. 1a). Unions too have presented specific and detailed complaints regarding Joint Board operations and, failing to achieve meaningful reforms, at one time or another the Electricians, Plumbers, Plasterers, Lathers, Bricklayers, Carpenters and Laborers' Unions all formally withdrew from the Joint Board Plan. And while all of these unions have, at various times, tacitly or expressly re-subscribed to the operations of the Plan, the

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[29] Proceedings of the 42nd Annual Convention of the Department, pp. 143-145 (1949).

[30] Report of President Haggerty to 55th Convention of the Department, p. 25 (1969).

Mason Contractors' Association and the Contracting Plasterers and Lathing International Association each permanently withdrew in 1963. Further, there has been no indication that the AGC, when it terminated the Plan and withdrew from further participation on September 30, 1969, had any intention of returning to a Joint Board structured along present lines.

2. Joint Board Ignores Efficiency and Economy.

In terms of the present Joint Board, the hoped-for improvement in Joint Board procedures which were heralded by the White House signing on February 2, 1965, has failed to materialize. Prior to its signing, the contractors negotiating with the Department expressed great concern over the Joint Board's continued adherence to archaic and unrealistic considerations without any regard for such factors as efficiency and economy or the interests of the consuming public.[31] Accordingly, instead of facing up to the issue of Joint

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[31] In rendering job decisions, § 7(a) of the Procedural Rules prescribes the order of priority to be followed by the Joint Board. (A. 344). The Joint Board must first decide each dispute on the basis of an applicable "decision of record." If none exists, then the governing criterion is an applicable "agreement of record." Thereafter, agreements between unions, trade practice and prevailing practice may apply. There are 84 "decisions of record" and 24 "agreements of record" reproduced in the "Green Book," more than 50% of which pre-date 1924. "In reality, therefore, the Joint Board resolves jurisdictional disputes by using standards that are approximately 40 years old, although the methods and materials used in the construction industry have advanced during this time span." Note, *The Non-neutral Employer and Section 10(k) of the National Labor Relations Act*, 20 Catholic U. L.Rev. 343, 356 (1970).

Board reform, the Department agreed to add the following provision to the 1965 Plan [Article III, § 1(f)]:

> The Joint Board should not ignore the interests of the consumer in settling jurisdictional disputes, but should give due regard to such factors as efficiency and economy of operation. (A., 348-349)

The above-quoted language, however, is nothing more than rhetorical gloss because, as previously noted, under the Procedural Rules of the Joint Board, there is virtually no way for the Joint Board to avoid predicating its awards upon ancient and largely irrelevant decisions or agreements of record.[32] If the Department was intent upon recognizing the interests of the consumer and requiring such factors as efficiency and economy to be considered in the rendering of job decisions, it would have been an easy matter to include such factors in the mandatory list of criteria which, under § 7(a), the Joint Board is bound to follow. However, the Joint Board's studied refusal to provide any reasoned explanation for its decisions, and the inclusion of "efficiency and economy" merely as negative matter which the Joint Board "should not ignore," has led the Court of Appeals for the Second Circuit to the conclusion "that this Joint Board gives little weight to considerations of economy and efficiency, and that past practice is usually held determinative."[33] Thus, contrary to the court below, there *is* an inherent infirmity in a procedure which purports to allow for considerations of efficiency and economy but which, in fact, are beyond application.

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[32] See Procedural Rules, § 7(a), (A. 344), and *supra*, note 31.

[33] *NLRB* v. *Local 25, Electrical Workers*, 396 F.2d 591, 594 (2nd Cir. 1968).

3. General Contractors Are Not Represented on the Joint Board

The Department, in response to the Laborers' motion and in its brief in opposition to the petitions herein, erroneously stated that "general contractors continue as parties to the current Plan and the Joint Board" (p. 2), and in an appendix to its brief, the Department lists the names of the thirteen Participating Contractors-Employers Associations which presently are signatory to the Plan, regarding which the Department asserts: "five are employers of the basic trades." (p. 3). Contrary to the statement of the Department, virtually every contractor of any size will, from time to time and in differing degrees, employ members of the five basic trades—Carpenters, Teamsters, Laborers, Bricklayers and Operating Engineers. Indeed, while there is no question that organized plumbing contractors are "specialty contractors" who deal almost exclusively with the Plumbers' Union for their employees, it is not at all uncommon for such plumbing contractors to employ members of the Laborers' Union, both in their shops as well as on their on-site utility installation crews. However, the employment of laborers or members of the other basic trades from time to time with regard to certain limited tasks does not convert a "specialty contractor" into a "general contractor."

As Professor Dunlop noted:

> The fact that some unions work exclusively, as a matter of policy or custom, for particular contractors, tends to convert competition among contractors also into jurisdictional disputes between unions. If a contractor is to hire such a craft he must also hire a sub-contractor. More accurately, the dispute is between a contractor and union on

> one side against another contractor and union on the other side." [34]

The "specialty contractors" invariably perform work pursuant to a sub-contract received from a general contractor. The NCA contractors happen to be "specialty contractors" who engage to construct large industrial complexes such as steel plants and chemical and petroleum refining installations. Such contractors, however, do not represent the large bulk of construction employees[35] and, by virtue of the relatively restricted nature of the work they have historically engaged to perform, specialty contractors would bring to Joint Board deliberations a very limited interest and experience with regard to the kinds of problems that general contractors face daily in the building, heavy and highway branches. Similarly, the general contractors' vast experience and knowledge of the three basic branches of the construction industry would not necessarily equip them to render realistic solutions to the problems of specialty contractors and their specialty

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[34] J. Dunlop, *Jurisdictional Disputes*, New York Univ., Second Annual Conf. on Labor, 486 (1949).

[35] John J. O'Donnell, former president of the NCA, in an address to the 45th Convention of the Department, pp. 181-2 (1952), stated that during the ten-year period from 1942 through 1952 "our average annual employment of American Federation of Labor craftsmen in this country alone . . . has been in excess of 60,000 workers." By way of contrast, more than 250,000 Laborers alone are employed by general contractors holding membership in the AGC, and this figure would conservatively be doubled at a minimum with regard to the employment of members of the remaining four basic trades. The Bureau of Labor Statistics reports that during 1968, there were 2,452,000 members of AFL-CIO unions engaged in "contract construction (building and special trade)." BNA, Labor Rel. Yearbook, 507 (1970).

employees.[36] It is thus apparent that while the Joint Board purports to be structured to provide equal representation for all segments of the industry, there are, in fact, no employers on the Joint Board whose voice or vote represents the interests of the general contractor and his laborer-employees. Yet, by the reasoning of the court below, the votes emanating from "specialty" employers and unions sitting as *the* Joint Board will effectively bind general contractors and the Laborers' Union, along with all other basic trades unions, to awards which may have no realistic relationship to the interests and conditions of the "non-specialty" segments of the construction industry.

D. THE DECISION BELOW DISRUPTS ESTABLISHED COLLECTIVE BARGAINING RELATIONSHIPS AND CONFLICTS WITH OTHER STATUTORY PROVISIONS

The Laborers' Union is typical of many of the unions in the construction industry in that it, and its affiliates, are signatory to thousands of collective bargaining agreements (national and local in scope) covering hundreds of thousands of employees. Most of these agreements do not contain provisions requiring resort to

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[36] But cf. Report of Executive Council to 40th Annual Convention of the Building Trades Department, 104-107 (1947), where the responsibility for draftsmanship and negotiations of the pre-Taft-Hartley "National Joint Conference Committee" was primarily relegated to the AGC and the employers representing the three basic branches of the general contractors' operations. Indeed, even the current 1970 Plan, adopted after the AGC withdrew from the Joint Board, still requires that the voting employer-members represent the following industries: "(1) industrial, (2) commercial, (3) *heavy and highway* and (4) residential." (Emphasis added.) Nevertheless, none of the thirteen Participating Contractors Employers' Associations listed in the Appendix to the Department's brief is engaged in the "heavy and highway" industry.

the procedures of the Joint Board in the event a dispute arises over an employer's work assignment. Accordingly, even though the Joint Board concedes that it "does not consider—or even inquire into—the contractual relationship of the affected parties," [37] prior to the instant case, employers who had not stipulated to be bound by Joint Board procedures could ignore its awards and seek relief through any applicable contractual procedures or by resort to § 10(k). However, under the reasoning of the court below, regardless what the parties to the collective bargaining agreement negotiated, Joint Board procedures and awards are now to be engrafted upon the parties' understandings by operation of law. Thus, while Congress has circumscribed the Labor Board's authority and denied it the power to write the terms of a collective bargaining agreement,[38] the court below, by judicial fiat, in effect has extended such powers to the members of the Joint Board.

Further, the court below embraced the Joint Board in the belief that it alone could provide "permanent" resolution of work assignment disputes because the NLRB has no authority "to compel an employer to change his assignment or a union to renounce an assignment that the employer is willing to give." [39] (A., 386).

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[37] See letter of November 16, 1970, from William J. Cour, Chairman National Joint Board, to Martin F. O'Donoghue, Esq. (Laborers' Appendix, *infra*, pp. 1a-3a).

[38] *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *NLRB* v. *Insurance Agents*, 36 U.S. 477, 487 (1960); *NLRB* v. *American Ins. Co.*, 343 U.S. 395, 404 (1952).

[39] Two recent law review notes have criticized the decision of the court below. In commenting upon the court's statement that the employer is not bound by a § 10(k) determination, one writer suggested that "conceivably an employer's noncompliance could

Aside from the fact that Joint Board awards provide no real permanency because each award is limited to the "particular job only," [40] the inherent defect in the foregoing rationale is that the decisions of the Joint Board, or any other private tribunal, will be equally ineffective in compelling a *non-stipulated* employer to change his assignment.

Moreover, it has never been definitively settled that the NLRB's § 10(k) award is without binding force or effect upon the employer. In *Auto Workers* v. *Scofield*, 382 U.S. 205 (1965), this Court noted that under the NLRB Rules and Regulations [29 C.F.R. § 102.8 (1965)], once the Board's "proceeding reached the adjudicative stage . . . the charging party is accorded formal recognition: he participates in the hearings as a 'party'; he may call witnesses and cross-examine others, may file exceptions to any order of the Trial

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be the basis for an unfair labor practice charge against the employer under 8(a)(1), (2), (3), or (5), but the Board has never considered such noncompliance to violate these sections." Note, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under § 10(k) of the NLRA*, 38 U. Chi. L. Rev. 389, 394 n. 32 (1971). Another writer has suggested that an employer, not otherwise bound to a voluntary method of adjustment, would be bound by a 10(k) award on the theory that federal policy would imply the dispute-resolving procedures of § 10(k) into the parties' collective bargaining agreement as a matter of law. Note, *The Non-neutral Employer and Section 10(k) of the National Labor Relations Act*, 20 Catholic U. L. Rev. 343, 354-55 (1970).

[40] The Procedural Rules and Regulations of the Joint Board provide: "each job decision of the Joint Board shall state that the job decision was predicated upon the particular facts and evidence before the Joint Board regarding the dispute and *shall be effective on a particular job only.*" (Emphasis added) (A., 344). The Joint Board award issued in the instant case was similarly restricted to "this particular job only." (A., 316).

Examiner [or hearing officer] and may file a petition for reconsideration to a Board Order. . . . Of course, if the Board *dismisses the complaint,* he can obtain review as a person aggrieved, which serves the 'public interest' by guaranteeing that the Board interpretation of the relevant provisions accords with the intent of Congress." (Emphasis added) (382 U.S. at 219). Thus, following the conduct of a 10(k) hearing upon an employer's 8(b)(4)(D) charge, if the Labor Board should dismiss any complaint predicated on such charge, the employer would be a "person aggrieved" within the meaning of § 10(f) of the Act [29 U.S.C.A. § 160(f)], possessing the right to obtain appellate review.[41]

Although a court proceeding under § 301 of the Act (29 U.S.C. 185) might decree that the successful union before the Joint Board is entitled to perform specified work and the losing union is not (which is precisely what NLRB determinations under § 10(k) presently provide) with all due deference to the dictum of the learned court below, there does not appear to be any legally enforceable way to require a non-stipulated employer to honor the Joint Board award or any subsequent court decree, or to employ members of the successful union.[42] Further, if the court below actually

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[41] And see particularly, *Transportation-Communication Employees Union* v. *Union Pacific Railroad Company*, 385 U.S. 157, 168 (1966), and dissenting opinion at 179, n. 10.

[42] Of the nine cases which have been instituted to enforce Joint Board awards against the non-stipulated contractor (and the union representing his employees) (cited *supra,* n. 6, in the attached Motion for Leave to File this Brief, *amicus curiae*), only one decision has issued. Chief Judge Weinman of the Southern District of Ohio, on May 5, 1971, granted the motion of the employer, B.G.

contemplates that the losing union should "renounce an assigment," what protection does it have when the employer commences his own § 301 or § 303 suit against the union for violating its collective bargaining agreement?[43] And in the same circumstances, what protection is afforded to the renouncing union when employees file unfair labor practice charges, and commence individual lawsuits for the union's breach of its duty of fair representation and for removing the beneficial provisions of their collective bargaining agreement?[44] Further, if an employer is to cease recognizing the incumbent collective bargaining representative and replace the existing employees with members of a "stranger" union which received the Joint Board award, how is the NLRB to handle charges alleging

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Danis Co., Inc., to dismiss it as a party to the action on the ground that since the employer was not stipulated to th eJoint Board:

> "The defendant contractor had no legal obligation to abide by the decisions of the Board established by the unions. Since the defendant contractor was protecting its legitimate business interests and exercising its legitimate right not to be bound by a contract to which it was not a party, its failure to adhere to the decision of the Board was completely justified and its failure to adhere to the Board's decision does not constitute an act of tortious interference with a contract." BNA Daily Lab. Rep. No. 96, A-3 (5/18/71).

[43] As this Court recognized in *CBS*, there is no requirement for "... 'substantive symmetry' between § 303(a)(4) on the one hand, and §§ 8(b)(4)(D) on the other," and specifically noted that it "has recognized the separate and distinct nature of these two approaches to the problem of handling jurisdictional strikes (citing *Juneau Spruce*)." [364 U.S. 573, 584-5 (1961.]

[44] The likelihood of requiring answers to the textual questions is supported by *Smith* v. *Evening News*, 371 U.S. 195, 200 (1962); *Local 12, Rubber Workers* v. *NLRB*, 368 F.2d 12, 22 (5th Cir. 1956), cert. denied, 389 U.S. 837 (1967); *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 176 (1957).

that the replacement of employees violates § 8(a)(3), that the recognition of the "stranger" union violates § 8(a)(2), and that in the process there was a trampling on the "employees'" established § 7 rights?[45] Although the NLRB has been careful in the preparation of its post-*CBS* 10(k) determinations to ensure that the work is awarded to *employees* represented by a particular union, rather than the union itself,[46] and

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[45] Professor Cox, in the *amicus curiae* brief submitted on behalf of the National Joint Board to the NLRB in *Acoustical Contractors*, 119 NLRB 1345 (1958) recognized that if jurisdictional awards by the NLRB were to require employer recognition without first having a determination that the union represented the employees, there would be direct violation of the substantive provisions of § 8(a) and (b) of the Act. Thus, in attempting to provide a rationale, Professor Cox cited the following illustration of a dispute over the unloading of electrical equipment between the Operating Engineers Union and the Electrical Workers Union.

> "The NLRB could not properly assign the work to the members of either union, but in the absence of agreement to submit the issue to the Joint Board it could, and should, determine whether the work was to be done by men who follow the trade of operating engineer or the calling of electrician. If all the employees are union members the distinction may seem to lack practical significance. Legally the difference is highly important. Awarding the work to electricians would leave the contractor free to employ any non-union man who had the craft qualifications and was currently following that calling. The decision, therefore, would not violate the policies of §§ 8(a)(3) or 8(b)(2); it would do nothing to spread unlawful closed or union shop conditions."

[*Acoustical Contractors* (Jt. Bd. Br. p. 62)]. See also, excerpt of Joint Board brief filed as appendix to Respondent's Brief (pp. 1a-4a) in *NLRB* v. *Radio and Television Broadcast Engineers, Local 1212 ("CBS")*, 364 U.S. 573 (1961), No. 69, Oct. Term, 1960.

[46] E.g., in the instant case the Labor Board's determination was to "the employees of Texas Tile and Martini, who are represented by the Tile Setters, but not to that Union or its members." (A., 23).

while the basis for such care derives from the NLRB's express recognition of the limitations imposed by § 8(a) and (b),[47] the court below apparently was either unaware or unconcerned that virtually insoluble conflicts for unions, employers and the NLRB were being created by the simplistic pronouncement that Joint Board awards would be readily enforceable. The unwarranted litigation which the decision below has already spawned can, and should be checked by this Court's declaration that the decision below was in error.

CONCLUSION

For the above-noted reasons, as well as those stated by the Petitioners in Nos. 1231 and 1134, the decision below should be reversed.

Respectfully submitted,

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May 1971

[47] *Lathers' Local 173 (Newark and Essex Plastering Co.)*, 121 NLRB No. 137, 42 LRRM 1519, 1522-23, and n. 47 (1958). Further, in testimony before the Senate Committee on Labor and Public Welfare considering proposed revisions of the Taft-Hartley Act, 83d Cong., 1st Sess., 2418 (1953), Professor Cox suggested specific statutory amendments to §§ 8(b)(4)(D) and 10(k). The specific changes would, *inter alia*, require the NLRB to make determinations under § 10(k) on the merits of the dispute and "the Board's determination of such a dispute shall identify the craft or trade to which the work is awarded by reference to the labor organization, *except as provided in § 8(a)(3) hereof.*" (Emphasis added) (at p. 2431).

APPENDIX

Joint Board Cases Decided for and Against Contractors' Assignment by Class of Contractor 1968-70

	Employer's Assignment	
	Supported	Reversed
General Contractors	29.5%	70.5%
Utility Contractors	22.2%	77.8%
Plastering Contractors	20.0%	80.0%
Masonry Contractors	11.7%	88.3%
Roofing	4.6%	95.4%
All Other Contractors	14.6%	85.4%
TOTAL CASES	19.4%	80.6%

SOURCE: Joint Board Minutes, 1968—September 1970.

National Joint Board for Settlement of Jurisdictional Disputes
Building and Construction Industry

815 Sixteenth Street, N. W.,
Washington, D. C. 20006
STerling 3-6817

November 16, 1970

In Reply Refer to:
IND 9/11/70

Martin F. O'Donoghue, Esq.
O'Donoghus & O'Donoghue
1912 Sunderland Place N. W.
Washington, D. C. 20036

Dear Mr. O'Donoghue:

This will acknowledge and reply to your letter of November 10, 1970 regarding certain relationships between a contractor and a union which has been awarded work as the result of a proceeding before the National Joint Board for the Settlement of Jurisdictional Disputes and reflected

in a job decision from that Board. While your letter makes reference to a specific dispute, Indiana 9/11/70, our reply to your questions is directed to any such dispute and is applicable whether or not the contractor may be stipulated or nonstipulated.

The Joint Board does not consider—or even inquire into—the contractual relationship of the affected parties. We know from experience, however, that the responsible contractor may have a formal contractual relationship with one, both or neither of the disputing unions. The presence or absence of a contract is of no concern to the Joint Board, except to the extent that we ascertain that the unions involved are affiliated with the Building and Construction Trades Department, AFL-CIO, and that the work in dispute is work within the building and construction industry.

A union which receives a decision from the National Joint Board is expected to furnish qualified workmen to the contractor responsible for the performance of the work specified in the job decision. This statement refers to the direct referral of men without any provision for further subcontracting. It also refers to the fact that the union shall refer as many or as few men as the contractor needs for the performance of the disputed work. The Joint Board does not specify the number of men a contractor shall employ for any given task or operation. In practice a complying contractor will usually replace those employees who were performing the disputed work prior to a job decision with an identical number of employees to be furnished by the union to which the work covered in the job decision was awarded.

There is no requirement under the policies or the Procedural Rules of the National Joint Board for a contractor to sign a contract with the union to which the work in a Joint Board job decision is awarded. The contractor, of course, is expected to pay the wage rates and comply with

the working conditions of the union to which the work was awarded. Refusal by the union to supply men in accordance with the above will result in a notice from the Joint Board to the contractor to proceed with the work in accordance with the original assignment.

Very truly yours,

WILLIAM J. COUR
William J. Cour,
Chairman

WJC/lp